

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of
Station WWOR(TV), Secaucus,
New Jersey

and

GARDEN STATE File No. BPCT-871223KG
BROADCASTING LIMITED
PARTNERSHIP

For a Construction Permit
Secaucus, New Jersey

APPEARANCES

Michael R. Gardner, Charles R. Milkis, and David B. Jeppsen on behalf of WWOR-TV, Inc.; *John K. Cooper* (Pfalz & Woller) and *Roy W. Boyce* (Cohen and Berfield, P.C.) on behalf of Garden State Broadcasting Limited Partnership; *Charles E. Dziedzic, Y. Paulette Laden, and Gary P. Schonman* on behalf of Chief, Mass Media Bureau.

DECISION

Adopted: December 27, 1991; Released: January 22, 1992

By the Commission:

I. INTRODUCTION

1. In this proceeding, WWOR-TV, Inc. (WWOR) seeks renewal of its license to operate station WWOR-TV, channel 9, in Secaucus, New Jersey. Garden State Broadcasting Limited Partnership (Garden State) has filed a mutually exclusive application for a construction permit for a new facility on channel 9. Now before the Commission is an initial decision on remand by Administrative Law Judge Richard L. Sippel denying a proposal by the parties to settle this proceeding. *WWOR-TV, Inc.*, 6 FCC Rcd 4350 (I.D. 1991). Under the terms of the settlement, Garden State would dismiss its application in return for payment of \$2 million. The ALJ found that, contrary to 47 U.S.C. § 311(d)(3)(B), Garden State's application was filed for the purpose of reaching a settlement agreement. The ALJ also found that in so doing Garden State committed an abuse of the Commission's processes, which was com-

pounded by misrepresentation and lack of candor; thus, he found that Garden State was unqualified to be a Commission licensee.

2. For the reasons which follow, we find that Garden State abused the Commission's processes by filing its application for the primary purpose of achieving a settlement. We also find that Garden State lacked candor in connection with this proceeding. Accordingly, we will deny Garden State's application for a construction permit without conducting further proceedings. Additionally, we find no merit to Garden State's allegations that issues should be added against WWOR. We will therefore grant renewal of WWOR's license to operate station WWOR-TV.

II. BACKGROUND

3. To understand the issues here, it is useful to set forth the somewhat complex procedural history leading up to the matters now before us. That history involves not only Garden State, but also an entity sharing some common principals with Garden State, Mainstream Television Limited Partnership (Mainstream). As will be seen, both the Mainstream and Garden State litigation culminated in settlements, a factor that contributed to the issues before us.

4. *Mainstream litigation.* Channel 9 was formerly a New York City station licensed to RKO General, Inc. (RKO). The Commission designated channel 9 for hearing on questions concerning RKO's basic and comparative qualifications. The Commission terminated that proceeding on March 29, 1983, after RKO, pursuant to an act of Congress, requested that channel 9 be reallocated to Secaucus. *RKO General, Inc. (WOR-TV)*, 53 RR 2d 671 (1983), *aff'd sub nom. Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (1984), *cert. denied*, 469 U.S. 1017 (1984). Subsequently, on June 4, 1986, RKO requested permission to assign channel 9 to a subsidiary of MCA, Inc. (MCA), until recently the parent corporation of WWOR.

5. Shortly before that, on March 31, 1986, Mainstream filed a petition seeking to have RKO's license for channel 9 set for early renewal and filed a mutually exclusive application for a construction permit. (RKO's license would otherwise have expired on March 12, 1988. *See Channel 9 Reallocation (WOR-TV)*, 53 RR 2d 469, 472a ¶ 15 (1983).) After RKO and MCA filed their assignment application, Mainstream filed a petition to deny the assignment.

6. Mainstream consisted of one general partner, Jean Wells (equity interest 3.75 percent), and several limited partners. *See WWOR-TV, Inc.*, 6 FCC Rcd 131, 132-33 ¶¶ 10-19, 134 ¶ 29 (I.D. 1991). One of the limited partners, Richard Rynd, in conjunction with Mainstream's counsel, Lewis I. Cohen, was instrumental in organizing Mainstream. Rynd's cousin, the late Sidney Fetner,¹ was one of Mainstream's limited partners. (As will be seen, Wells, Fetner, and Cohen are also associated with Garden State.)

7. The Commission, on December 9, 1986, rejected Mainstream's allegations, dismissed Mainstream's application, and approved the assignment of channel 9 from RKO to MCA's subsidiary. *RKO General, Inc.*, 1 FCC Rcd 1081 (1986). Mainstream thereupon appealed the Commission's action to the United States Court of Appeals for the District of Columbia Circuit. 6 FCC Rcd at 134 ¶¶ 25-29. Mainstream's appeal was terminated by a settlement agreement in which RKO paid Mainstream \$5.37

million on April 1, 1987. Of that amount, Wells received \$178,694, Fetner received \$1.3 million, and Cohen's law firm was paid \$528,500. MCA commenced operation on channel 9 on April 3, 1987. *Id.* at 134 ¶ 30.

8. *Garden State litigation.* On December 21, 1987, WWOR, then a subsidiary of MCA, filed the renewal application now before us. Two days later, Garden State filed its application for a construction permit. As was Mainstream, Garden State is a limited partnership with Wells as the sole general partner (equity interest 4 percent). 6 FCC Rcd at 134-35 ¶¶ 31-36. Fetner was one of several limited partners, and Cohen served as Garden State's counsel.

9. On August 31, 1988, WWOR challenged the propriety of Garden State's application in a motion to enlarge issues. WWOR contended that Garden State's application was filed for the improper purpose of achieving a settlement, contrary to the provisions of 47 U.S.C. § 311(d)(3). (The Commission may not approve a settlement filed for the purpose of reaching or carrying out a settlement agreement.) The ALJ granted WWOR's motion and specified an issue. *WWOR-TV, Inc.*, FCC 88M-3567 (Oct. 25, 1988).² Nonetheless, on September 27, 1990, the parties submitted a settlement agreement. (As will be seen, WWOR terminated the settlement on September 3, 1991, thereby rendering moot the parties' joint request for approval of the settlement.)

10. In a partial initial decision, the ALJ concluded that Garden State had not abused the Commission's processes by acting contrary to 47 U.S.C. § 311 in filing its application, and approved the settlement agreement. *WWOR-TV, Inc.*, 6 FCC Rcd 131 (I.D. 1991). The Commission, however, reviewed the partial initial decision on its own motion and concluded that the existing record was inadequate to resolve certain material questions of fact. The Commission therefore remanded the case to the ALJ for further deliberations. *WWOR-TV, Inc.*, 6 FCC Rcd 1524 (1991), *recon. dismissed*, 6 FCC Rcd 4879 (1991). After remand, the ALJ found that Garden State had filed its application for the improper purpose of reaching a settlement, denied the settlement, and denied Garden State's application. Garden State has appealed.³

III. ABUSE OF PROCESS

11. *Partial Initial Decision.* In connection with his initial consideration of whether Garden State filed its application for the purpose of reaching a settlement, the ALJ heard the testimony of Cohen and Wells, the two surviving individuals with first-hand knowledge concerning the circumstances surrounding Garden State's formation. The ALJ found that Fetner had discussed the subject of additional broadcast ventures with Cohen around the time of the Mainstream settlement on or about March 2, 1987. 6 FCC Rcd at 131 ¶ 31. According to Cohen's testimony, Fetner asked Cohen to advise him of any speculative opportunities in broadcasting. The witnesses testified that in a subsequent telephone conversation between Cohen and Wells -- which occurred sometime between April 15, 1987 and July 16, 1987 -- Wells expressed criticism of channel 9's programming, which she considered unresponsive to the needs of northern New Jersey. *Id.* at 134-35 ¶ 32. Cohen relayed the substance of his conversation with Wells to Fetner, and Fetner requested that a meeting be arranged. *Id.* at 135 ¶ 33.

12. Cohen, Wells, Fetner, and Fetner's wife met for dinner in New York. 6 FCC Rcd at 135 ¶¶ 33-35. The ALJ found that the evidence did not establish the date of this meeting. At the dinner meeting, Fetner offered Wells an interest in a limited partnership to be formed to challenge channel 9's renewal, and within a few days Wells accepted Fetner's offer.

13. The principals then formed Garden State, prepared a budget, made financial arrangements, and filed an application. 6 FCC Rcd at 135-36 ¶¶ 36, 40-43. As part of this effort, Garden State paid a consultant approximately \$19,000 to prepare an analysis of channel 9's programming. Garden State's total expenditures for expert and technical assistance were around \$30,000.

14. The ALJ also made findings concerning the negotiations leading to the settlement agreement. 6 FCC Rcd at 136 ¶¶ 44-47. While proceedings were going on before the FCC, MCA (then WWOR's parent corporation) was also suing Garden State in federal district court for allegedly violating the Mainstream settlement, which MCA contended barred Garden State's challenge. *Id.* at 140 n.9. After the judge in that court action asked for a status report on settlement, WWOR's counsel arranged to meet with Cohen to discuss settlement. *See* tr. 1096, 1446, 1571. Three meetings occurred between January 1990 and May 1990, but no settlement resulted. In mid-September MCA was engaged in negotiations with an international corporation, which sought to acquire MCA. *See* paragraph 64, below. These negotiations heightened MCA's interest in settling with Garden State. Garden State ultimately accepted an MCA offer of \$2 million.

15. The ALJ concluded that the record failed to demonstrate that Garden State filed its application with an intent to obtain a settlement. 6 FCC Rcd at 136-37 ¶¶ 49-50. He observed, for example, that, although the retainer agreement with Cohen's law firm provided for a bonus in the event of a settlement, it also provided for a bonus if Garden State were to win a license. The ALJ noted that Garden State had been vigorously prosecuting its application. Garden State had submitted evidence, filed numerous pleadings, and expended approximately \$30,000 on expert and litigation assistance.

16. The ALJ also noted the Bureau's complaint that the record did not establish when the meeting between Wells, Fetner, and Cohen took place. 6 FCC Rcd at 137-38 ¶¶ 51-56. Thus, it was impossible to determine what opportunity Wells had to review channel 9's programming before Garden State was initiated. The ALJ considered this a material question but found that any adverse inference that could be drawn from the lapses in the witness' memories was offset by the probative value of Garden State's vigorous prosecution.

17. *Remand order.* The Commission remanded this proceeding because it found that the witness' inability to fix the dates of pertinent discussions made it impossible to evaluate the question of whether Garden State was formed after its principals had a reasonable opportunity to monitor channel 9's programming. 6 FCC Rcd at 1525-26 ¶¶ 8-10, n.8. In this regard, the Commission disagreed with the ALJ that Garden State's prosecution of its application was sufficient to establish the *bona fides* of the application without further inquiry into this point.⁴

18. *Initial Decision on Remand.* On remand, the ALJ held further hearings and found that documentary evidence from Fetner's business records and those of Cohen's law firm conclusively demonstrated that the dinner

meeting involving Wells, Cohen, and Fetner took place on April 30, 1987 -- only three weeks after MCA (*i.e.*, WWOR) commenced service on channel 9 after its assignment from RKO. 6 FCC Rcd at 4351 ¶ 8.⁵ The ALJ found that the chronology established by the documentary evidence, which placed the inception of Garden State almost immediately after the Mainstream payoff and the commencement of service by WWOR, warranted a reevaluation of the testimony of Cohen and Wells. *Id.* at 4355 ¶ 18, 4362 ¶ 58.

19. In particular, the ALJ found that the documentary evidence undermined the credibility of their previous testimony that Garden State was formed in response to Wells' criticism of channel 9's programming. 6 FCC Rcd at 4355-56 ¶¶ 18-20. The ALJ observed that Wells had originally testified that she would not have voiced such criticism as early as April, since MCA had just taken over the station and it would not have had time to make significant changes in programming. The ALJ found that at the remand hearing Garden State significantly revised its theory of the case to deemphasize the significance of Wells' purported dissatisfaction with channel 9's programming. *Id.* at 4354-55 ¶¶ 16-18, 4362 ¶ 56. The ALJ therefore rejected Garden State's earlier account of the discussions leading to its formation as lacking credibility. *Id.* at 4355-56 ¶¶ 20-21. In light of Garden State's failure to present a credible account of its formation, the ALJ concluded that Fetner's stated intent to speculate and the principals' presumed awareness that a settlement was an option in a proceeding such as this established that they formed Garden State to achieve a settlement. The ALJ concluded that Garden State abused the Commission's processes by filing its application with the improper motive of reaching a settlement and made a misrepresentation in certifying that it did not file for this purpose. *Id.* at 4366 ¶ 75.

20. *Exceptions.* Garden State contends that the ALJ had no basis to reconsider his prior finding that Garden State did not file its application to achieve a settlement. Garden State points out that the only relevant new fact developed on remand is that the initial meeting between Fetner, Wells, and Cohen occurred on April 30, 1987. According to Garden State, the precise date of the meeting has no decisional significance. In this regard, Garden State notes that Cohen testified at the original hearing that his conversation with Wells might have occurred as early as April. Garden State argues that the inconsistencies between the testimony of Wells and Cohen merely represent faded memory -- which is not surprising since the witnesses testified four years after the events in question.

21. Additionally, Garden State asserts that the record contains no indication that the parties seriously discussed settlement before January 1990. Garden State further asserts that the record demonstrates that Cohen discerned in Wells' comments on programming a potential basis for a legitimate challenge to WWOR, which he conveyed to Fetner. According to Garden State, the parties conscientiously prosecuted their application based on these grounds.

22. Garden State suggests that the ALJ based his adverse conclusions on an erroneous impression that Commission policy treats any applicant challenging a renewal as presumptively suspect. Similarly, Garden State accuses the ALJ of unrealistically requiring it to demonstrate that it filed its application out of disinterested altruism.⁶

23. *Reply.* The Bureau supports the initial decision. According to the Bureau, it is significant that Garden State's principals decided to file a challenge less than a month after the Mainstream settlement. The Bureau maintains that the timing of this decision makes Garden State's testimony regarding dissatisfaction with programming incredible. Having nullified the reason for filing given by Garden State, the Bureau submits that Garden State's primary purpose was to secure a settlement.

24. *Discussion.* The issue before us is whether Garden State abused the Commission's processes by filing its application "for the purpose of reaching or carrying out [a settlement] agreement", which is proscribed by 47 U.S.C. § 311(d)(3)(B). As we have noted elsewhere, "abuse [of process] is not an easy matter to prove." *Memorandum Opinion and Order in BC Docket No. 81-742*, 5 FCC Rcd 3902, 3903 ¶ 8 (1990). To some extent this reflects flaws in the licensing process -- including the comparative renewal system -- that we have attempted to correct prospectively through Rule Making. In so doing, we recognized that incentives and mechanisms for abuse, such as filing an application for the purpose of achieving a settlement, have been inherent in the licensing process. *First Report and Order in BC Docket No. 81-742*, 4 FCC Rcd 4780, 4782 ¶ 21 (1989). Nonetheless, the process allows even an applicant with apparently little chance of prevailing a right to prosecute its application. *RKO General, Inc. (WOR)*, 4 FCC Rcd 4072, 4073 ¶ 7 (1989). Moreover, where the facility being challenged appears profitable, even the most insincere applicant -- such as one whose actual expectation is to receive a settlement -- can credibly proclaim its interest in becoming the licensee. *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742*, 3 FCC Rcd 5179, 5182 ¶ 25 (1988).

25. Given these difficulties, we will not infer improper purpose in filing an application or pleading without a specific showing of improper motivation. *RKO General, Inc. (WOR)*, 4 FCC Rcd at 4073 ¶ 7.⁷ See also *Radio Carrollton*, 69 FCC 2d 1139, 1151-52 ¶ 26 (1978), *recon. denied*, 72 FCC 2d 264 (1979). In this regard, we find two factors especially probative as indications that Garden State filed its application for the primary purpose of achieving a settlement -- a purpose prohibited by the Communications Act. First, we find that, in attempting to persuade the Commission that its application was not filed for the purpose of reaching a settlement, Garden State gave an account of its intent that was at best without credibility and at worst false and misleading. This account principally relies on Wells' purported role in initiating the challenge. Second, we find that the remaining evidence bearing on Garden State's purposes, especially that concerning Fetner's intentions, does not demonstrate a primary interest in broadcast ownership. Rather, the circumstances readily lend themselves to the conclusion that Fetner was interested in receiving a settlement payoff. This is particularly so in light of the fact that the crucial meeting between Fetner, Cohen, and Wells, leading to the formation of Garden State, occurred almost immediately after these same three individuals received substantial payoffs from the Mainstream settlement.

26. *Wells' role.* In urging the Commission to approve the settlement agreement in this proceeding, Garden State submitted a declaration by Wells stating in part:

The application of Garden State was not filed for the purpose of reaching or carrying out this settlement agreement but for the purpose of constructing and operating the station. I believed that Garden State's challenge was justified based on my perception that there was a substantial basis for questioning the adequacy of WWOR-TV's service to the Northern New Jersey area where I reside.

Garden State Exh. 6 at 1. Our review of the record discloses that, in explaining and supporting this assertion, Garden State and its principals lacked candor by exaggerating the role of Wells' concern over programming as motivation for Garden State's challenge. In this regard, it is highly instructive to compare the accounts of Garden State's formation given by Garden State and its principals before and after the remand, when it became possible to fix with precision the date of the pertinent discussions and meeting.

27. At the original hearing, Cohen's testimony indicated that Wells, in her initial conversation with Cohen, voiced serious criticism of channel 9's programming based on careful study. He testified:

[Wells] said to me I really can't believe it, but I've been watching WWOR a lot, every minute I have a chance and I cannot believe it, but the non entertaining [sic] programming and the news programming is just like it was under RKO. . . . And she said she'd been watching it a lot and she rattled off to me the news programs that she had reference to and the non entertainment programs she had reference to.

Tr. 1429.

She also told me that she was -- she believed after her viewing, that the station was not acting as an outlet for local expression in Northern New Jersey. She said that hadn't changed, it hadn't done that, in her view, under RKO's stewardship and it wasn't doing it under MCA's stewardship. And she said that she thought that that was something that was very important.

Tr. 1531-32. Cohen also testified that Wells had definite plans for taking action against WWOR:

Mrs. Wells told me, as I recall, that Mainstream's application had never been accepted by the Commission and she was aware that MCA had to file an application for renewal of license. She was also aware that there would be -- that a new entity such as Garden State would have an absolute right to be compared against MCA, which was not the situation earlier.

Tr. 1531. In describing the dinner meeting with Wells and Fetner, Cohen furthered the impression that the decision to form Garden State was a response to Wells' concern about programming:

So, at the meeting, the purpose of the meeting -- the discussion at the meeting was that [Fetner] asked [Wells] many, many, many questions about what she had been viewing, and why she felt the way she did, and how systematically she had been viewing it....

Tr. 1445.

28. Wells' original testimony also stressed the role that her dissatisfaction with channel 9's programming played in spurring the formation of Garden State.⁸ Indeed, Wells' insistence that her conversation with Cohen could not have occurred as early as April 1987 (as Cohen had suggested) was premised on her conviction that she would not have made an adverse judgment about channel 9's programming so soon after MCA took over. Tr. 1835-36. In her version of the dinner meeting, Wells also emphasized her dissatisfaction with channel 9's programming and her intention to change it. She stated:

Well, the essence of the conversation [at the dinner meeting] was that I was interested in programming on Channel 9 and felt that they were not -- it was a similar situation as RKO, that they were not interested in New Jersey, that they were interested in the broader market of the Tri-State area and that I thought that I could do a better job in doing that, in running the station as a viable New Jersey medium.

Tr. 1741.

29. Garden State relied on this testimony in arguing the validity of its proposal to the ALJ: ". . . Garden State's challenge was premised from its inception⁹ on perceived inadequacies in WWOR-TV's service to the Northern New Jersey area it is licensed to serve." *Proposed Findings of Fact and Conclusions of Law* filed December 13, 1990 by Garden State at 17 ¶ 29. Similarly: "The underlying issue, however, is whether Garden State pursued its challenge based on perceived deficiencies in the service of WWOR-TV. . . . [there is] no basis for speculative innuendo that the substance of the initial discussions was not accurately recounted to the best of the participant's ability after a passage of almost four years." *Reply to Proposed Findings of Fact and Conclusions of Law* filed December 20, 1990 by Garden State at 2 ¶ 2.

30. The discovery of unequivocal evidence that the dinner meeting, and thus the initial conversation between Cohen and Wells, occurred in April 1987 (just three weeks after MCA took control of channel 9) undermined the credibility of this testimony and revealed its misleading character. Garden State and its principals implicitly acknowledged as much by substantially revising their theory of the case following remand to deemphasize Wells' dissatisfaction with channel 9's programming as a motivating factor.

31. After remand, Wells denied that she had made a firm judgment about channel 9's programming at the time she spoke to Cohen and met with Fetner (in keeping with her earlier statement that she would not have made such a judgment so soon after MCA took control). Tr. 2176-77. Rather, she testified: "Well, in a casual remark to Mr. Cohen I said to him that I had been watching Channel 9 and that nothing had changed and he told me that was interesting." Tr. 2177.

32. Accordingly, in Wells' post-remand account of the dinner meeting, her concern over programming was not the only or even the main basis for the decision to challenge channel 9. Wells' described another basis as: "My own -- Mr. Cohen's business -- Mr. Fetner's business interests, for one thing, in going forward with this. Without him there would have been no money." Tr. 2178. In this regard, Wells further testified:

Q: But on the basis of what you watched, the decision was made to invest literally thousands of dollars to challenge the license renewal of a major independent station, is that correct?

A: I don't know that that was the only basis. I can't -- obviously, other people had, you know -- there was an investment, so it wasn't just based upon the basis of my watching the programming. But it added an area on which to base -- on which to begin the basis of a challenge.

Tr. 2179.

Wells' explained her reference to an "investment" as follows:

Sidney Fetner was investing money in the partnership and getting other friends and relatives to invest money in the partnership, hoping to become an owner of Channel 9.

Tr. 2195.

33. Garden State's arguments on remand reflect this changed testimony:

The dinner meeting was the result of a casual remark by Ms. Wells to Mr. Cohen to the effect that the Channel 9 programming had not changed after the transfer to MCA. . . . [H]er remark to Mr. Cohen was not intended as a final judgment on MCA's service. . . . It was Mr. Cohen who perceived in her remark a matter of sufficient interest to bring to Mr. Fetner's attention. Her observation was one of several factors which provided a basis to begin a challenge, including Mr. Fetner's interest

Remand Proposed Findings of Fact and Conclusions of Law filed May 17, 1991 by Garden State at 3-4 ¶ 3.

There is no statutory or Commission requirement that Garden State have had "*bona fide* beliefs" that WWOR-TV's program[ming] was deficient and would not change. . . . [I]t is perfectly permissible to file an application based on the mere hope of ultimately discrediting an opponent.

Reply Findings of Garden State Broadcasting Limited Partnership filed May 24, 1991 at 10 ¶ 12.

The initial remark by Ms. Wells which led to the dinner meeting was . . . a casual remark that merely noted a fact, i.e., that there had been no change in programming. This remark did not suggest that the programming would never change nor was it in-

tended to suggest that a challenge be made for the license. The possible significance of Ms. Wells' remark was recognized by counsel who communicated it to Sidney Fetner whose interest led to the April 30, 1987 dinner meeting. Ms. Wells' observation was one factor in the decision to go forward, along with Mr. Fetner's interest

Id. at 10-11 ¶ 13.

Ultimately, the Bureau's conclusion . . . that "concern over the programming was not the *reason* for the challenge . . . is in one sense correct. The Bureau errs, however, in asserting that Garden State ever claimed that the *reason* for its filing was its purely abstract "concern over programming." The *reason* for the challenge was Ms. Wells' desire to operate Channel 9. The lack of change in programming already observed as well as skepticism that this would change provided one basis (along with others) for believing that there existed a sufficient likelihood of success to justify going forward. It was not, however, the underlying *reason* nor did Garden State ever so claim.

Id. at 12 ¶ 14. (Emphasis in the original.)

34. We find that the foregoing demonstrates that Garden State, in urging that its application was not filed for the purpose of reaching a settlement, gave a misleading account of the circumstances leading to its formation. Garden State's original account left the clear impression that Wells' dissatisfaction with channel 9's programming and her desire to "do a better job" provided primary motivation for mounting a challenge. Thus, relying on the original testimony of its witnesses, Garden State emphasized that its challenge was based "from its inception" (which we now know occurred in April 1987) on "perceived" inadequacies in channel 9's programming. Garden State's original characterization of the facts strongly suggested that Cohen's role was merely to bring the motivated Wells to the attention of an interested financier.

35. On remand, however, confronted by the early date of the dinner meeting, Garden State disavowed much of the significance of the deficiencies in channel 9's programming "perceived" by Wells in the "inception" of Garden State's challenge. Under Garden State's revised theory, Wells' "casual" comments to Cohen neither reflected criticism of channel 9 nor expressed an interest in mounting a challenge. Rather, Garden State now characterizes its perception of channel 9's programming, at the inception of its challenge, as a "mere hope of ultimately discrediting WWOR" and "one of several factors that provided a basis to begin a challenge." In Garden State's new version, Cohen, knowing of Fetner's interest in an investment, became an active agent independently formulating the idea of a challenge on the colorable basis of channel 9's programming. Garden State now portrays Wells as more of a recruit and less of a moving force.¹⁰

36. Thus, as aptly noted by the ALJ (6 FCC Rcd at 4362 ¶ 58), the production of evidence firmly establishing the date of the April 30, 1987 meeting resulted in the "collapse" of Garden State's original account of its formation. We cannot lightly disregard this discrepancy. Garden State's original account was its chosen means of demonstrating that it did not file its application for the purpose of reaching or carrying out a settlement. The failure

of this explanation casts grave doubts on Garden State's motivation. In particular, it suggests that Garden State's explanation was intended to conceal the fact that the true purpose in filing its application was improper. We therefore closely scrutinize the remaining evidence.

37. *Fetner's purposes.* As discussed above, the record does not support Garden State's original claims that Wells was a moving force in initiating the challenge to channel 9 and that her purposes were a primary motivation for the challenge. Thus, we find that the most meaningful indication of Garden State's true purpose in filing its application lies in the nature of Fetner's interest in the project, although he was nominally only a passive limited partner. In this regard, the record demonstrates Fetner's central importance as a moving force behind Garden State's challenge. Fetner sought the meeting with Wells at which he offered her a four percent interest in a limited partnership to challenge WWOR. 6 FCC Rcd at 135 ¶¶ 33, 35. Fetner agreed to arrange for the financing of the venture and selected all of the limited partners, who were his family and friends. *Id.* at 135 ¶ 37. Only Fetner discussed the partnership retainer agreement with Cohen. *Id.* at 135 ¶ 37.

38. We have carefully examined Cohen's account of Fetner's stated intentions in the formation of Garden State, where Cohen had the opportunity to characterize Fetner's intentions in the most favorable light possible. It is therefore striking that Cohen's own account fails to establish that Fetner had a primary intention to become a broadcast owner. Rather, Cohen's own words readily lend themselves to the interpretation that Fetner primarily expected to receive a settlement payoff -- or that a payoff would serve his purposes at least as well as the award of a license. According to Cohen, Fetner indicated that:

... he had a lot of resources, financial resources available and that he was interested in what he called speculative kinds of situations where he could risk money and get a real big reward.

Tr. 1424-25. Significantly, when Cohen suggested to Fetner that he buy a broadcast station, Fetner reportedly rejected the idea stating:

... that he had reached the stage in his life where he was looking to do things that were fun. He wanted to do things that gave him excitement and that were different and unique where he had fun and that owning¹¹ a television station, just buying a television station, to him, wasn't what he was looking for. He said he owned lot of businesses. ... He liked the challenge and the chase.

Tr. 1425. As Garden State suggests, these words do not rule out the possibility that Fetner was interested in acquiring a station at low cost through the comparative renewal process. *See* tr. 1448. However, these words do not affirmatively support that interpretation. Rather, the emphasis on "gamesmanship" in this testimony tends to negate any idea that Fetner was expressing a primary interest in "owning and operating" a facility. *See* tr. 1424. This emphasis suggests, indeed, that Fetner was at best indifferent to the mechanism by which the return on his speculative investment might be produced.

39. The context in which Fetner made these statements -- within days of the Mainstream settlement (Fetner's only other broadcast venture), in which he received a \$1.3 million payoff on an investment of \$21,428 -- also bears on the question of Fetner's likely state of mind. *See* 6 FCC Rcd at 134 ¶¶ 29, 31; tr. 1426. Whether or not Fetner and Cohen expressly discussed the prospects for settlement, the possibility of settlement was an inescapable reality. Thus, filing a further application for the purpose of reaching another settlement would represent an entirely logical outgrowth of Fetner's recent experience. By contrast, the record discloses no circumstances that would provide a foundation for believing that Fetner had a primary interest in ownership of channel 9.

40. All told, there is enough ambiguity concerning Fetner's intentions, as described by Cohen, to make this a close case, were it necessary to decide the case solely on the basis of Cohen's testimony about Fetner's intentions. The preponderance of the evidence in the case as a whole, however, weighs against Garden State -- including reliance on the negative inferences to be drawn from Garden State's own failures of proof. We find it significant that Garden State originally chose to substantiate its claim that it had not filed for the purpose of reaching a settlement with an account that we find at best grossly unreliable. *See Bird Provision Co. v. Owens Country Sausage, Inc.*, 379 F.Supp. 744, 751 (N.D. Tex. 1974) (when a party fabricates evidence, it is proper to draw unfavorable inferences against it). Additionally, Garden State's own account of Fetner's crucial interest in prosecuting the application -- together with the proximity of the Mainstream settlement -- readily lends itself to the conclusion that Fetner was interested in receiving a settlement payoff.

41. In view of the foregoing, other factors that Garden State cites as demonstrating the *bona fides* of its application have little probative value. These factors are: (1) that Garden State vigorously prosecuted its application; (2) that Garden State hired an expert and took other steps to substantiate its claims that channel 9's programming was deficient; and (3) that WWOR, and not Garden State, initiated settlement discussions. If the record were bare in other respects, these factors could provide support for the claim that Garden State had a primary interest in prosecuting its application on its merits. Here, however, the record contains evidence specifically impeaching Garden State's purported intent in filing its application. Under these circumstances, the factors relied on by Garden State demonstrate no more than that Garden State had taken the minimal steps to make its application credible in anticipation of receiving a settlement.¹² Garden State's attempt to establish that it did not intend to pursue a settlement is especially unpersuasive since the abuse of process issue was designated early in the proceeding, which would tend to deter Garden State from pursuing a settlement.

42. We therefore find that, based on the record before us, the preponderance of the evidence shows that Garden State filed its application primarily for the purpose of achieving a settlement. This conduct would warrant rejection of the settlement (if it were still pending) under 47 U.S.C. § 311(d) and also warrants denial of Garden State's application as an abuse of process under the added basic qualifications issue.

IV. LACK OF CANDOR

43. *Initial Decision on Remand.* As an additional matter related to the abuse of process issue, the ALJ considered whether Garden State deliberately withheld evidence establishing the date of the dinner meeting between Wells, Fetner, and Cohen, now known to be April 30, 1987.

44. The ALJ observed that in its proposed findings of fact and conclusions of law, filed at the original hearing, the Bureau criticized Garden State for failing to establish the dates of the conversation between Wells and Cohen and the meeting. 6 FCC Rcd at 4364 ¶ 64. The Bureau asserted that the dates were related to the credibility of Wells' claim that she had an opportunity to evaluate channel 9's programming and contended that Garden State should produce business documents establishing the dates. *Id.* at 4364-65 ¶¶ 64, 67. According to the ALJ, Garden State made no attempt to conduct a search responsive to the Bureau's concerns about the dates and instead characterized these concerns as "quibbles." *Id.* at 4363 ¶ 65. The ALJ noted that in his partial initial decision, he rejected Garden State's assertion that the dispute over dates was a "quibble." He characterized the question involved as a "material circumstance." The ALJ found, however, that, despite his statement of concern in the partial initial decision, Garden State made no effort to reopen the record to provide relevant evidence. *Id.* at 4365 ¶ 67.

45. The ALJ found that, nonetheless, within six days after the release of the Commission's remand order, Garden State produced highly reliable evidence of the dates. 6 FCC Rcd 4364 ¶ 66. This evidence consisted of Cohen's airline ticket to New York City dated April 30, 1987 and a credit card receipt, also dated April 30, for Jake's restaurant (where Cohen met with Wells before the dinner meeting). *Id.* at 4351 ¶ 8. Additionally, Fetner's widow, Sondra, recovered from among Fetner's papers an April 30 credit card receipt for Marcella's restaurant, where the dinner meeting took place.

46. The ALJ found that Garden State deliberately ignored the Bureau's and the ALJ's concerns, despite recognizing their significance, because Garden State did not want to risk uncovering any new evidence that might jeopardize approval of the settlement. 6 FCC Rcd at 4364-65 ¶¶ 64, 66-67. The ALJ found that Garden State sought the readily available evidence only after it realized that the case would be remanded for taking further evidence and that the Bureau would almost certainly seek the relevant documents. Thus, the ALJ concluded that Garden State lacked candor by seeking to insure that significant evidence would remain concealed, until that course was no longer expedient.

47. *Exceptions.* Garden State denies that it lacked candor in failing to introduce evidence of the date of the dinner meeting prior to remand.¹³ Garden State observes that Cohen did not misstate the extent of his efforts to pinpoint the date (by checking his diary), that he had no actual knowledge that pertinent documents existed in his firm's records, and that his own testimony suggested that the date of the dinner meeting might have been in April.¹⁴ According to Garden State, it simply did not occur to Cohen, who was also occupied with other aspects of trial preparation, to consult business records at that point.

48. Garden State also asserts that neither the ALJ nor the Bureau originally considered Garden State's failure to pinpoint the date decisively significant (since each rec-

ommended approving the settlement despite the failure to establish the date). Garden State insists that it was under no obligation to follow the Bureau's suggestion that Garden State search its business records. Additionally, Garden State maintains that "counsel's purported failure [to conduct such a search] would not have precluded efforts to pursue the matter had other parties decided to do so. . . ." *Exceptions and Brief* filed August 14, 1991 by Garden State at 16.

49. *Reply.* The Bureau contends that Garden State lacked candor in failing to produce evidence in its possession until, in effect, forced to do so by the Commission's expression of concern. The Bureau characterizes this as a form of "gamesmanship" condemned in *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981). According to the Bureau, such conduct falls within the definition of lack of candor, which includes concealment, evasion, and other failures to be fully informative. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 ¶ 6 (1983). The Bureau asserts that Garden State's intent to deceive can be inferred because Garden State was on notice of the potentially crucial significance of the relevant date.

50. *Discussion.* We find that Garden State violated its duty of candor by failing to produce evidence demonstrating the date of the April 30 meeting at the original hearing. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 229-30 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927, 457 U.S. 1119 (1982) (licensee disqualified for failing to come forward with a candid statement of relevant facts after another party put a question before the Commission). Following the designation of the abuse of process issue, WWOR specifically sought the production of:

All documents relating to the formation and operation of Garden State, including . . . all documents relating to or reflecting any meetings, contacts or communications among Garden State's principals...regarding the formation of Garden State....

Second Motion of WWOR-TV, Inc. for Order Requiring Production of Documents filed November 4, 1988 by WWOR at 26 ¶ 41. The motion expressly sought documents within the custody of Garden State's attorneys. *Id.* at 16 ¶ 13. It also expressly provided that the document requests were continuing in character.¹⁵ *Id.* at 17 ¶ 17. The ALJ granted the relevant document request. *WWOR, Inc.*, FCC 88M-4056 (Nov. 28, 1988) at 6. Garden State's failure to produce the documents from its law firm's records in response to this request directly contributed to the ALJ's original inability to fix the date of the dinner meeting.

51. Garden State has shown no justification for its continued failure to produce documentation from Cohen and Berfield's files responsive to the document request. We reject the idea that Garden State's failure to disclose evidence establishing the date of the dinner meeting earlier can be justified because Garden State supposedly did not appreciate the significance of the information involved.¹⁶ (Indeed, Cohen admitted that Wells searched her records in response to the document request. Tr. 2243.)

52. Garden State certainly knew that the date of the dinner meeting was significant. Cohen admitted that inquiry had been made during the course of discovery as to the date of the dinner meeting. Tr. 2242. Indeed, Cohen stated during his original testimony that he anticipated

that the ALJ would want to know the dates of the pertinent discussions. Tr. 1437. He even complained during cross examination that documents were not made available to help refresh his memory and undertook to further consult his diary in an attempt to reconstruct the date of the dinner meeting. Tr. 1435, 1441-42.

53. Later in the proceeding, Garden State received additional notice of its continuing need to produce the relevant documents. In its proposed findings at the original hearing, the Bureau specifically argued that establishing the dates was material and explicitly questioned Garden State's failure to consult business records to establish the dates. *Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law* filed December 19, 1990 at 31-32 ¶ 3. Although the ALJ, like the Bureau, originally recommended grant of the settlement, he called the dispute over the dates "material" and the failure to establish the dates "troubling." 6 FCC Rcd at 137-38 ¶ 55.

54. The foregoing demonstrates that Garden State deliberately avoided producing documents responsive to a continuing discovery request, although Garden State was specifically on notice that the documents involved were material and had been explicitly reminded that relevant documents could presumably be found in its attorney's files. In this regard, the record indicates that Cohen shared the Bureau's expectation that relevant documents probably were at hand in the law firm's files. Thus, Cohen knew that information of the type ultimately produced was made part of his firm's records in the ordinary course of business. Cohen testified that he routinely made notations of the details of business expenses on the pertinent receipts and then submitted them to clerical personnel to be posted to a ledger entry. Tr. 2235-36. When Cohen wished to obtain the relevant records, he only had to ask a secretary to retrieve them, which she did within a few days. Tr. 2229, 2231, 2234. That Cohen had a strong expectation that the sought after evidence was readily available is illustrated by his testimony that he "could not understand it" when his secretary did not also recover a hotel receipt -- until he was reminded that he stayed with the Fetners, not at a hotel. Tr. 2239.

55. As our earlier discussion indicates, we find the evidence ultimately produced highly significant in resolving the abuse of process issue. We cannot condone an applicant's decision to conceal such evidence. See *RKO*, *supra*.¹⁷ We find this conduct inherently deceptive and a further basis to deny Garden State's application.

V. BIFURCATION OF PROCEEDING

56. *Remand order.* When the ALJ added the abuse of process issue against Garden State, he did so in the context of considering whether to approve the parties' settlement. In our remand order, however, we noted that resolution of this issue might also be relevant to Garden State's qualifications to be a Commission licensee. We stated that if the ALJ found disqualifying abuse of process, it would be appropriate for him to deny Garden State's application without further hearings. 6 FCC Rcd at 1526 n.21. Because of the special circumstances here, we made an exception to our usual practice of not bifurcating proceedings to dispose of only some of the issues. See *RKO General, Inc. (WOR-TV)*, 61 FCC 2d 1062, 1063-64 ¶ 4 (1976).

57. *Exceptions and Motion for Remand.* In its exceptions, Garden State contends that separate resolution of the abuse of process issue abridges its right to a full and fair hearing. In its motion for remand, Garden State further elaborates its argument that the resolution of the issues should not be bifurcated. Garden State, notes that, on September 3, 1991, WWOR terminated the settlement pursuant to a provision of the agreement giving it that right. Thus, because there is no longer a pending settlement and in light of its argument that piecemeal resolution of the issues is inappropriate, Garden State asserts that the proceeding should now be remanded for a full hearing on all aspects of the parties' basic and comparative qualifications.

58. Garden State argues that separate consideration of a renewal challenger's qualifications creates an undue pressure to disqualify the challenger, thereby abridging the challenger's hearing rights. Garden State asserts that the Commission's established policy is consistent with this reality. Garden State also argues that its qualifications cannot now be considered because it did not have a full opportunity to address the issues on remand,¹⁸ and the Commission does not have a full record before it on the remanded issues. Garden State submits that, in light of the infirmities that it has noted, the ALJ has demonstrated that he does not have the minimal qualifications as a trier of fact and that any further hearings should be before a new ALJ.

59. *Responsive pleadings.* WWOR and the Bureau respond that further hearings are unnecessary and that they would cause wasteful delay. They contend that there is no legal bar to bifurcating a proceeding and the record here as to the remanded issues is complete. These parties further contend that the termination of the settlement does not moot the finding that Garden State committed a disqualifying abuse of process.

60. *Discussion.* We find no impropriety in considering Garden State's qualifications on a bifurcated basis. The Commission has the discretion to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. 47 U.S.C. § 4(j). Ordinarily the Commission, as a matter of policy, discourages bifurcating cases because of the danger that such a procedure will create a multiplicity of appeals or remands. *RKO General, Inc. (WOR - TV)*, 61 FCC 2d at 1063-64 ¶¶ 4-5. Here, however, as in *RKO*, ample circumstances exist to make an exception to that policy. *Id.* at 1064-65 ¶ 6. The pendency of the settlement agreement constituted a sound reason to immediately resolve the question of the *bona fides* of Garden State's application, which also bore on Garden State's basic qualifications, since it involved a potential abuse of process. Because resolution of the abuse of process issue moots all other aspects of this proceeding, conducting further lengthy hearings on such matters would merely cause delay and waste administrative resources.

61. This procedure does not abridge Garden State's right to due process. *RKO*, 61 FCC 2d at 1065 n.4. Although the court has not hesitated to set aside Commission actions in which it found that challengers have been improvidently disqualified, the court has given no indication that disqualifying the challenger in a bifurcated hearing was improper where the record adequately supported this action. See, e.g., *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117, 1118 n.2 (D.C. Cir. 1978). As our discussion above indicates, Garden State had a full op-

portunity here to develop a record on the remanded issues and to argue its case. Garden State does not point to any specific respect in which the record concerning the abuse of process or lack of candor questions would have to be supplemented to provide an adequate basis for a decision.¹⁹

VI. WWOR'S QUALIFICATIONS

62. *First Petition to Enlarge Issues.* Garden State asserts that an issue should be designated to determine whether WWOR made misrepresentations, lacked candor, or abused the Commission's processes by taking inconsistent positions on the merits of this case. These allegations relate to pleadings filed by WWOR after it entered into the settlement agreement with Garden State. Garden State observes that after the original hearings before the ALJ, WWOR filed proposed findings and conclusions recommending that "there is no direct and conclusive evidence that Garden State filed for the purpose of obtaining a settlement." Similarly, after the Commission remanded the issue for further hearings (WWOR having filed no exceptions to the ALJ's partial initial decision), WWOR again supported the *bona fides* of Garden State's application and recommended approval of the settlement agreement.

63. Garden State points out that, after the ALJ issued his adverse initial decision on remand, however, WWOR changed its position. WWOR exercised its option under the agreement to terminate the settlement (a right all of the parties had if the Commission had not finally approved the settlement by September 1, 1991²⁰). WWOR then filed a Motion for Expedited Review in which it asserted that the adverse conclusions in the initial decision on remand were fully supported by the record. Garden State maintains that WWOR's inconsistent positions raise the question of whether WWOR misrepresented its true view of the record as a matter of litigation tactics. Garden State urges that, if so, WWOR lacked candor and abused the Commission's processes. Garden State asserts that WWOR's change in position is particularly objectionable, since, during the hearing, the ALJ attempted to definitively ascertain WWOR's views by questioning Robert D. Hadl, the officer who signed the settlement on behalf of WWOR and MCA, as to whether he believed that Garden State had filed its application in good faith. Tr. 1088 et seq.; WWOR Exh. 21-B, Exh. B. Garden State characterizes WWOR's Motion for Expedited Review as an attempt to file an untimely brief in support of the initial decision on remand. Garden State maintains that WWOR has already exhibited a pattern of filing abusive pleadings, which is reflected in several petitions to enlarge issues that the ALJ previously denied in this proceeding.

64. *Oppositions.* WWOR denies that it took inconsistent positions on the abuse of process issue. Rather, WWOR explains that it merely commented in a limited way on the state of the existing record and did not draw any final conclusions on the merits of the issue. Thus, WWOR claims that its statements were not contradictory. The Bureau agrees that WWOR made no false statements of material fact and exhibited no intent to conceal. As to the alleged pattern of abusive conduct claimed by Garden State, WWOR observes that the ALJ consistently ruled in WWOR's favor as to these matters. The Bureau asserts

that WWOR's motion was not untimely because it was filed on the date for responding to Garden State's exceptions.

65. *Discussion.* We find that Garden State has made no *prima facie* showing that WWOR abused the Commission's processes or lacked candor before the Commission. We recognize that, once WWOR entered into a settlement with Garden State, the relationship between these two parties was no longer adversarial. Cf. *Brocklesby v. United States*, 767 F.2d 1288, 1292-93 (9th Cir. 1985) (under the Federal Rules of Evidence, a settlement is admissible to show the then non-adversarial relationship of parties). Thus, it is not surprising that WWOR's statements concerning Garden State's culpability were circumspect.

66. We find no evidence that WWOR made false or misleading statements of material fact in maintaining its non-adversarial posture or that it contradicted itself in material respects. Hadl's testimony, for example, reaffirms that WWOR filed its petition to enlarge issues against Garden State with a good faith belief that Garden State abused the Commission's processes (based on the circumstantial evidence set forth in the petition). Tr. 1171-72. Hadl gave no indication that WWOR had changed its views with regard to the relevance of the circumstantial evidence, in urging approval of the settlement, but merely stated that he had been advised by counsel that "based on the state of the record at the moment, there is no direct and conclusive evidence [of abuse of process]." Tr. 1173. WWOR adopted a similar position in its original proposed findings of fact and conclusions of law. See *WWOR-TV's Proposed Findings of Fact and Conclusions of Law* filed December 13, 1990 at 20-22 ¶¶ 8-10. In its submission following the remand hearing, WWOR offered no conclusions of law as to Garden State's ultimate culpability, a fact that the ALJ recognized. 6 FCC Rcd at 4352 ¶ 10.

67. After WWOR terminated the settlement, consistent with the terms of that agreement, WWOR reverted to an adversarial position. The statement in WWOR's Motion for Expedited Review (at 2) that the ALJ's conclusions after remand are "fully supported by the substantial new evidence" does not materially contradict its previous characterizations of the record, which refrained from drawing any conclusions about the significance of the new evidence. Thus, we find no evidence of any matter warranting further consideration.²¹

68. *Second Petition to Enlarge Issues.* In its second petition to enlarge issues, Garden State contends that WWOR's actions in this proceeding reveal that WWOR: (1) made misrepresentations with respect to another matter before the Commission and (2) is in violation of the Communications Act. Garden State observes that, on December 26, 1990, the Commission approved the transfer of WWOR from MCA to a new corporation now called Pinelands, Inc. (Pinelands), which is owned by the former stockholders of MCA. *WWOR-TV, Inc.*, 6 FCC Rcd 193 (1990), *recon. denied*, FCC 91-347 (Nov. 13, 1991). This transfer was necessitated by the acquisition of MCA by the Japanese company, Matsushita Electrical Industrial Company, Ltd. (Matsushita), since control of a broadcast station by a foreign corporation is prohibited by 47 U.S.C. § 310(b).

69. Garden State alleges that the circumstances surrounding the joint termination of the settlement agreement by WWOR and MCA reveal that MCA continues to control Pinelands, contrary to representations made to the

Commission and to 47 U.S.C. § 310(b). Garden State points out that Hadl, who signed the termination notice on behalf of MCA (but not WWOR), is both an officer of MCA and a director of Pinelands. According to Garden State, the notice was written on MCA stationery but delivered in an envelope from WWOR-TV's law firm. Garden State further alleges that MCA had undertaken to pay WWOR's liability under the settlement and that termination of the settlement therefore benefitted MCA rather than WWOR (which would be obliged to participate in any further aspects of this proceeding).

70. As further evidence of MCA's control of Pinelands, Garden State alleges that Pineland's board of directors has delegated its authority to an executive committee consisting of present and former MCA officers. Additionally, Garden State alleges that Pinelands' has a "share purchase rights plan" and other "poison pill" provisions that make it difficult if not impossible for Pinelands' stockholders to alter the authority of directors chosen by MCA.

71. *Oppositions.* WWOR and the Bureau contend that Garden State has demonstrated no evidence of impropriety. They assert that there is nothing remarkable in the fact that WWOR and MCA jointly terminated the settlement agreement, since they entered into it jointly when WWOR was a wholly-owned subsidiary of MCA. WWOR and the Bureau characterize Garden State's allegations regarding Pineland's board of directors and other corporate arrangements as a rehash of arguments already rejected by the Commission in approving the transfer of WWOR to Pinelands.

72. *Discussion.* We find that Garden State's second petition to enlarge issues makes no *prima facie* showing that WWOR misrepresented facts to the Commission or that MCA is exercising improper *de facto* control over WWOR. We have already considered and rejected Garden State's allegations concerning Pineland's board of directors and "poison pill" provisions in ruling on WWOR's transfer of control application. Garden State has not advanced any new information that would warrant a different result. Thus, in previously rejecting Garden State's allegations concerning Pinelands' board of directors, we noted that six of the eight directors would not have any connection with MCA after the proposed spin-off. 6 FCC Rcd at 201-02 ¶ 18. Although Garden State now observes that substantial authority will be delegated to a committee of three directors, two of the three likewise have no continuing relationship with MCA. The Commission also rejected Garden State's allegations that the "poison pill" provisions, which Pinelands then expected to adopt, were improper. *Id.* at 204 ¶ 21. We reject Garden State's assertion that the specifics of the provisions, as they were later adopted, demonstrate their improper nature. Rather, we find that these provisions are consistent with our understanding, when we approved the transfer, of what "poison pill" provisions typically involve.

73. Turning specifically to the termination of the settlement, we find nothing improper in the actions of MCA and WWOR, even assuming *arguendo* that they acted "collusively" for the benefit of MCA. As we pointed out elsewhere, when a company is spun-off, we do not require that the former subsidiary and its parent sever all existing contractual relationships. 6 FCC Rcd at 201 ¶ 16. Thus, the failure to do so does not necessarily portend the exercise of improper *de facto* control. Here, MCA and WWOR jointly entered into the settlement agreement as parent and subsidiary. WWOR Exh. 21-B, Exh. A at 1. In

view of this preexisting joint contractual relationship, there is nothing unusual in WWOR and MCA mutually deciding how to deal with their joint rights and responsibilities under the agreement. *Cf.* 6 FCC Rcd at 203 ¶ 20 (MCA and WWOR not required to abrogate existing contracts upon approval of the spin-off). Garden State has shown no reason to find that the joint actions of WWOR and MCA in this regard provide any basis for an inference that MCA will exercise improper *de facto* control over WWOR in the future.

VII. ORDERS

74. ACCORDINGLY, IT IS ORDERED, That the Motion for Expedited Review filed August 26, 1991 by WWOR-TV, Inc. IS DISMISSED as moot.

75. IT IS FURTHER ORDERED, That the Motion to Strike filed September 26, 1991 by Garden State Broadcasting Limited Partnership IS DENIED.²²

76. IT IS FURTHER ORDERED, That the Motion for Remand filed September 10, 1991 by Garden State Broadcasting Limited Partnership IS DENIED.

77. IT IS FURTHER ORDERED, That the Petitions to Enlarge Issues filed September 10, 1991 and September 18, 1991 by Garden State Broadcasting Limited Partnership ARE DENIED.

78. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement filed September 27, 1990 by WWOR-TV, Inc. and Garden State Broadcasting Limited Partnership IS DISMISSED as moot.

79. IT IS FURTHER ORDERED, That the application of WWOR-TV, Inc. for renewal of license (File No. BRCT-871221KE) IS GRANTED, and the application for Garden State Broadcasting Limited Partnership for a construction permit (File No. BPCT-871223KG) IS DENIED.

80. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ Fetner died April 12, 1988. Tr. 2038.

² In its pleadings before us, Garden State renews its argument that the ALJ relied on speculation and therefore did not have adequate grounds to specify an issue. We agree with the ALJ, however, that the circumstances set forth in the ALJ's order raise a substantial question warranting the addition of an issue.

³ Now before the Commission are: (1) Exceptions and Brief filed August 14, 1991 by Garden State, and the Mass Media Bureau's Reply to Exceptions and Brief filed August 26, 1991; (2) a Motion for Expedited Review filed August 26, 1991 by WWOR, and a Response to Motion for Expedited Review filed August 30, 1991 by Garden State; (3) a Motion for Remand filed September 10, 1991 by Garden State, and oppositions filed September 16, 1991 by the Bureau and September 19, 1991 by WWOR; (4) a Motion to Strike [WWOR's opposition] filed

September 26, 1991 by Garden State; (5) a Petition to Enlarge Issues filed September 10, 1991 by Garden State, oppositions filed September 19, 1991 by WWOR and September 20, 1991 by the Bureau, and a reply filed September 26, 1991 by Garden State; and (6) a Petition to Enlarge Issues filed September 18, 1991 by Garden State, oppositions filed September 30, 1991 by WWOR and the Bureau, and a reply filed October 7, 1991 by Garden State.

⁴ The Commission also suggested that evidence as to Garden State's efforts to establish its financial qualifications might bear on the *bona fides* of its application. The ALJ made extensive findings as to this matter. 6 FCC Rcd at 4356-60 ¶¶ 22-43. Our examination of the ALJ's findings indicates that Garden State is correct in asserting that they bear primarily upon the question of Garden State's financial qualifications, rather than the abuse of process issue. Accordingly, we need not consider at this time whether, as Garden State claims, the record demonstrates that it took adequate measures to establish its financial qualifications. To the extent that Garden State might argue that its efforts to establish its financial qualifications demonstrates that it has vigorously prosecuted its application, we address the issue of vigorous prosecution at paragraph 43, below.

⁵ As discussed at paragraph 47, below, this evidence consists of two credit card receipts for restaurant service and a plane ticket.

⁶ Garden State also challenges several collateral findings by the ALJ. According to Garden State, these include: (1) an irrelevant finding that Cohen represented other renewal challengers that reached settlements in other proceedings (6 FCC Rcd at 4360 ¶ 44); (2) an erroneous finding that *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991) found that Cohen and Wells deceived the Commission in that proceeding (6 FCC Rcd at 4367 n.9); (3) an erroneous finding that the Commission found channel 9's programming meritorious in *RKO General, Inc. (WOR-TV)*, 1 FCC Rcd 1081 (1986) (6 FCC Rcd at 4362 ¶ 56); (4) an unsupported finding that Garden State's vigorous litigation was a settlement tactic (*Id.* at 4360 ¶ 45, 4361 ¶ 48); (5) an unsupported finding that Garden State engaged in settlement discussions prior to January 1990 (*Id.* at 4360 ¶ 44, 4381 ¶ 48); and (6) an unsupported finding that Garden State attempted to delay discovery as a settlement tactic (*Id.* at 4368 n.21). Our own analysis of the record does not rely on any of these questioned findings.

⁷ Also for this reason, we wish to make clear that we have carried out a careful *de novo* review of the record. Thus, in the pages that follow, we endeavor to set out the evidentiary basis for our findings in great detail. We believe that this approach is especially appropriate here, since Garden State has repeatedly complained that the ALJ exhibited bias. See, e.g., *WWOR-TV, Inc.*, 5 FCC Rcd 2845 (1990). As a related matter, Garden State has objected to the further involvement in the resolution of this case of a Commission employee, whom Garden State accused of improper conduct. See *Petition for Investigation*, 6 FCC Rcd 4762 ¶ 1 (1991). Although we discerned no impropriety in the employee's conduct, we note that the employee in question has not participated in the preparation of this decision.

⁸ Wells, however, attributed her awareness of WWOR's need to file for license renewal to Cohen. Tr. 1836-37.

⁹ Garden State's own testimony establishes that the inception of Garden State's challenge occurred at the dinner meeting involving Fetner, Wells, and Cohen. At this meeting, Fetner proposed to Wells that she accept an interest in a limited partnership to seek channel 9. See tr. 1448-49, 1741, 1746.

¹⁰ Thus, we find no basis for Garden State's claim that Wells' desire to operate channel 9 was the reason for the challenge. Rather, the record indicates that Fetner and Cohen supplied the initiative in mounting the challenge, beginning with hosting the April 30 meeting.

¹¹ As corrected by *WWOR-TV, Inc.*, 90M-3943 (Dec. 13, 1990).

¹² For example, when the ALJ in his partial initial decision found that Garden State had vigorously litigated its application, he relied mainly on motions that Garden State filed in contesting the abuse of process issue and not the standard comparative issue. See 6 FCC Rcd at 136-37 ¶ 50, 141 n.13.

¹³ Garden State also asserts that the ALJ exceeded the scope of the remand order, which refers only to the abuse of process issue, by considering this additional issue. Given our intention that matters related to the abuse of process issue be thoroughly explored, we ratify the ALJ's action. In this regard, we agree with the ALJ that the circumstances surrounding the disclosure of the meeting date and the date's crucial significance to the abuse of process issue warrant the addition of an issue. We note that the ALJ's designation of a specific issue gave Garden State the necessary notice and opportunity to be heard on this matter.

¹⁴ Cohen suggested that he might have discussed channel 9 with Wells during a discussion occasioned by the filing, in April 1987, of two other broadcast applications in which she was involved. Tr. 1431.

¹⁵ This provision of the motion is consistent with the practice of the federal courts, which requires parties to supplement discovery responses known to be inaccurate or incomplete. See *Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1272 (8th Cir. 1975); Fed.R.Civ.Pro. 26(e)(2)(B). It is also consistent with 47 C.F.R. § 1.65, which requires applicants to report changes as to any matters that may be of decisional significance.

¹⁶ On remand, Cohen explained that he had made no attempt to obtain records from his firm during discovery because: "At no time during the discovery process was it suggested that a search of our firm's records be made for business records that might reflect the exact date of the dinner meeting nor did it ever occur to me to do so because no other parties had evidenced a belief that the precise date was significant." Garden State Exh. 12 at 2-3. See also tr. 2242-43. We find this explanation unconvincing. As previously noted, contrary to Cohen's assertion, the document request specifically referred to documents within the custody of Garden State's attorneys. As to the significance of the precise date of the meeting, see paragraphs 54-55, below.

¹⁷ We note that RKO was disqualified despite its attempt to attribute to counsel the response found lacking in candor.

¹⁸ Specifically, Garden State complains that it had no notice that the ALJ would resolve the substance of the financial qualifications issues against Garden State. As previously noted, our decision does not rely on these matters.

¹⁹ Thus, contrary to Garden State's contention, the proceedings conducted on remand fully accord with our expectations expressed in remanding this case. See 6 FCC Rcd at 4878 n.1.

²⁰ See WWOR Exh. 21-B, Exh. A at 4 ¶ 6.

²¹ Garden State has made no specific showing either individually or cumulatively that would warrant overturning earlier rulings by the ALJ declining to add other issues against WWOR. Accordingly, we have no basis to find that WWOR has exhibited a pattern of abusive conduct or that the ALJ has shown bias by ignoring that supposed pattern of conduct.

²² Garden State asserts that WWOR filed its opposition to Garden State's motion for remand three days late. However, consideration of WWOR's opposition will neither cause delay nor prejudice Garden State.